IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF CALIFORNIA

HECTOR HERNANDEZ, **Petitioner,** **v.** **K. MENDOZA-POWERS,** **Respondent.**	**CV F 02-5548 WMW HC** **MEMORANDUM OPINION AND ORDER RE PETITION FOR WRIT OF HABEAS CORPUS**

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pursuant to Title 28 U.S.C. § 636(c)(1), the parties have consented to the jurisdiction of the United States Magistrate Judge.

PROCEDURAL HISTORY

On December 1, 1998, a complaint was filed in Tulare County Superior Court charging Petitioner with fifty-five felony sexual counts against a single minor victim. Petitioner pled no contest to two counts of lewd and lascivious act with a child under age 14,

Penal Code Section 288, (a);[1] four counts of unlawful sexual intercourse with a person under age 16, Section 261.5(d); and one count of lewd and lascivious act with a child age 14 or 15, Section 288(c)(1). The judge who accepted the plea indicated that the sentence would not exceed 12 years 8 months. After his motion to withdraw his plea was denied, Petitioner was sentenced to serve a term of 10 years 8 months.

On direct appeal, Petitioner's counsel filed a brief pursuant to People v. Wende, 25 Cal.3d 436 (1979). The Court of Appeal affirmed the judgment. Petitioner did not seek review by the California Supreme Court.

Petitioner filed a petition for writ of habeas corpus in the California Supreme Court on February 27, 1001, which the court summarily denied without explanation on June 27, 2001.

On September 2, 2001, Petitioner filed a petition for writ of habeas corpus in the Tulare County Superior Court. The court denied the petition on October 16, 2001, by letter order explaining "[a]ll issues raised should have been or were raised on appeal. The transcript clearly shows each and every right was waived."

On October 28, 2001, Petitioner filed another petition for writ of habeas corpus in Tulare County Superior Court. The court denied the petition on November 1, 2001, specifying that the denial was "with prejudice."

On November 25, 2001, Petitioner filed a petition for writ of habeas corpus with the California Supreme Court. The court summarily denied the petition on March 27, 2002, with citations to In re Clark, 5 Cal.4th 750 (1993), In re Swain, 34 Cal.2d 300, 304 (1949), and In re Duvall, 9 Cal.4th 464, 474 (1995).

On April 24, 2002, Petitioner filed the present petition. On October 22, 2002, Respondent moved to dismiss the petition as untimely. On December 5, 2002, this court entered an order dismissing the petition. Judgment was entered on December 6, 2002. On

[1]All further statutory references are to the Penal Code.

October 18, 2004, the United States Court of Appeals for the Ninth Circuit, in an unpublished opinion, vacated this court's judgment and remanded the case to this court for further proceedings.

On February 16, 2005, the court entered an order requiring Respondent to respond to the petition by May 23, 2005. Respondent filed an answer on May 17, 2005, to which Petitioner filed a traverse on June 21, 2005.

DISCUSSION

JURISDICTION

Relief by way of a petition for writ of habeas corpus extends to a person in custody pursuant to the judgment of a state court if the custody is in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(c)(3); Williams v. Taylor, 120 S.Ct. 1495, 1504 fn.7 (2000). Petitioner asserts that he suffered violations of his rights as guaranteed by the United States Constitution. In addition, the conviction challenged arises out of the Tulare County Superior Court, which is located within the jurisdiction of this court. 28 U.S.C. § 2254(a); 2241(d). Accordingly, the court has jurisdiction over the action.

On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which applies to all petitions for writ of habeas corpus filed after its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997), *cert. denied,* 522 U.S. 1008, 118 S.Ct. 586 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (quoting Drinkard v. Johnson, 97 F.3d 751, 769 (5th Cir.1996), *cert. denied,* 520 U.S. 1107, 117 S.Ct. 1114 (1997), *overruled on other grounds by* Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059 (1997) (holding AEDPA only applicable to cases filed after statute's enactment). The instant petition was filed on April 24, 2002, after the enactment of the AEDPA, thus it is governed by its provisions.

STANDARD OF REVIEW

This court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

The AEDPA altered the standard of review that a federal habeas court must apply with respect to a state prisoner's claim that was adjudicated on the merits in state court. Williams v. Taylor, 120 S.Ct. 1495, 1518-23 (2000). Under the AEDPA, an application for habeas corpus will not be granted unless the adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding." 28 U.S.C. § 2254(d); Lockyer v. Andrade, 123 S.Ct. 1166, 1173 (2003) (disapproving of the Ninth Circuit's approach in Van Tran v. Lindsey, 212 F.3d 1143 (9th Cir. 2000)); Williams v. Taylor, 120 S.Ct. 1495, 1523 (2000). "A federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." Lockyer, at 1174 (citations omitted). "Rather, that application must be objectively unreasonable." Id. (citations omitted).

While habeas corpus relief is an important instrument to assure that individuals are constitutionally protected, Barefoot v. Estelle, 463 U.S. 880, 887, 103 S.Ct. 3383, 3391-3392 (1983); Harris v. Nelson, 394 U.S. 286, 290, 89 S.Ct. 1082, 1086 (1969), direct review of a criminal conviction is the primary method for a petitioner to challenge that conviction. Brecht v. Abrahamson, 507 U.S. 619, 633, 113 S.Ct. 1710, 1719 (1993). In addition, the state court's factual determinations must be presumed correct, and the federal court must accept all factual findings made by the state court unless the petitioner can rebut "the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1);

Purkett v. Elem, 514 U.S. 765, 115 S.Ct. 1769 (1995); Thompson v. Keohane, 516 U.S. 99, 116 S.Ct. 457 (1995); Langford v. Day, 110 F.3d 1380, 1388 (9th Cir. 1997).

In cases where the California Supreme Court's opinion is summary in nature, this court "looks through" that decision and presumes it adopted the reasoning of the last state court to have issued a reasoned opinion. See Ylst v. Nunnemaker, 501 U.S. 797, 804-05 & n. 3, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991) (establishing, on habeas review, "look through" presumption that higher court agrees with lower court's reasoning where former affirms latter without discussion); see also LaJoie v. Thompson, 217 F.3d 663, 669 n. 7 (9th Cir.2000) (holding federal courts look to last reasoned state court opinion in determining whether state court's rejection of petitioner's claims was contrary to or an unreasonable application of federal law under § 2254(d)(1)). However, when there is no state court decision articulating a rationale, a reviewing court "has no basis other than the record" for determining whether the state court decision merits deference under 28 U.S.C. § 2254(d)(1). *Delgado,* 223 F.3d at 981-82. In such circumstances, a reviewing court can still apply the "objectively reasonable" standard of *Williams* to the state court decision. This does not mean *de novo* review by the federal court, but rather "an independent review of the record is required to determine whether the state court clearly erred in its application of controlling federal law." *Thomas v. Hubbard,* 273 F.3d 1164, 1170 (9th Cir.2001); *Bailey,* 263 F.3d at 1028; *Delgado,* 223 F.3d at 982.

EXHAUSTION

A petitioner who is in state custody and wishes to collaterally challenge his conviction by a petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The exhaustion doctrine is based on comity to the state court and gives the state court the initial opportunity to correct the state's alleged constitutional deprivations. Coleman v. Thompson, 501 U.S. 722, 731, 111 S.Ct. 2546, 2554-55 (1991); Rose v. Lundy, 455 U.S. 509, 518, 102 S.Ct. 1198, 1203 (1982); Buffalo v. Sunn, 854 F.2d 1158, 1163 (9th

Cir. 1988).

A petitioner can satisfy the exhaustion requirement by providing the highest state court with a full and fair opportunity to consider each claim before presenting it to the federal court. Picard v. Connor, 404 U.S. 270, 276, 92 S.Ct. 509, 512 (1971); Johnson v. Zenon, 88 F.3d 828, 829 (9th Cir. 1996). A federal court will find that the highest state court was given a full and fair opportunity to hear a claim if the petitioner has presented the highest state court with the claim's factual and legal basis. Duncan v. Henry, 513 U.S. 364, 365, 115 S.Ct. 887, 888 (1995) (legal basis); Kenney v. Tamayo-Reyes, 504 U.S. 1, 112 S.Ct. 1715, 1719 (1992) (factual basis). Additionally, the petitioner must have specifically told the state court that he was raising a federal constitutional claim. Duncan, 513 U.S. at 365-66, 115 S.Ct. at 888; Keating v. Hood, 133 F.3d 1240, 1241 (9th Cir.1998). For example, if a petitioner wishes to claim that the trial court violated his due process rights "he must say so, not only in federal court but in state court." Duncan, 513 U.S. at 366, 115 S.Ct. at 888. A general appeal to a constitutional guarantee is insufficient to present the "substance" of such a federal claim to a state court. See, Anderson v. Harless, 459 U.S. 4, 7, 103 S.Ct. 276 (1982) (Exhaustion requirement not satisfied circumstance that the "due process ramifications" of an argument might be "self-evident."); Gray v. Netherland, 518 U.S. 152, 162-63, 116 S.Ct. 1074 (1996) ("a claim for relief in habeas corpus must include reference to a specific federal constitutional guarantee, as well as a statement of the facts which entitle the petitioner to relief.").

In 1996, Congress enacted the Anti-Terrorism and Effective Death Penalty Act. Pub.L. No 104-132, 110 Stat. 1214. Under the AEDPA, exhaustion can be waived by the respondent. 28 U.S.C. § 2254(b)(C). The court can also excuse exhaustion if "(I) there is an absence of available State corrective process; or (ii) circumstances exist that render such a process ineffective to protect the rights of the application." 28 U.S.C. § 2254(b)(1)(B).

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VOLUNTARINESS OF PLEA

Petitioner contends that his no contest plea was entered without his having a full understanding of the plea and its consequences, and that the trial court sentenced him before he expressly waived his Boykin/Tahl rights. Petitioner claims that he was therefore deprived of his right to due process. Respondent disputes this contention.

A plea of guilty is constitutionally valid only to the extent it is "voluntary" and "intelligent." Brady v. United States, 397 U.S. 742, 748 (1970). In determining whether a plea was knowingly, voluntarily and intelligently made, a reviewing court must accord a strong presumption of verity to the declarations made by a defendant in open court. Blackledge v. Allison, 431 U.S. 63, 74 (1977). "[R]epresentations [made by] the defendant, his lawyer, and the prosecutor at [a plea] hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings." Id. at 73-74. Furthermore, Petitioner's allegations of a coerced plea must be specific and point to a real possibility of a constitutional violation. "[S]ubsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible." Id. at 74, *citing* Machibroda v. United States, 368 U.S. 487, 495-496 (1962); Price v. Johnston, 334 U.S. 266, 286-287 (1948).

In the present case, Petitioner presented this contention to the California Supreme Court, which denied it without explanation on June 27, 2001. This court looks through that silent denial to the decisions of the Superior Court, which twice found that Petitioner waived "each and every right." See Ylst v. Nunnemaker, 501 U.S. at 804-05 & n. 3 (1991). This court finds that Petitioner's claim that he was sentenced before he waived his rights is clearly without merit, because, as found by the Superior Court, the transcript of the change of plea hearing shows that he expressly waived his Boykin/Tahl rights. Accordingly, this court finds that Petitioner has failed to carry his burden of demonstrating that the adjudication of

this claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding." 28 U.S.C. § 2254(d). Accordingly, the court finds that this claim provides no basis for habeas corpus relief.

ACTUAL INNOCENCE

Petitioner contends that his confinement is unconstitutional because he is actually innocent of the crimes of which he was convicted. Respondent disputes this contention as a basis for habeas corpus relief, arguing that an actual innocence claim is not cognizable after a guilty plea and, further, is not cognizable in federal habeas as a free-standing claim

The United States Supreme Court, in Tollett v. Henderson, 411 U.S. 258, 266 (1973), held that "[w]hen a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea."

By pleading guilty, a defendant waives the right to a jury trial, to confront one's accusers, to compel the attendance of witnesses, and generally to challenge the evidence that he committed the offense. See Boykin, 395 U.S. 238, 89 S.Ct. 1709. Typically, one who enters a valid guilty plea, cannot on habeas corpus challenge pre-plea constitutional violations. Tollett v. Henderson, 411 U.S. at 266-67; see also Moran v. Godinez, 57 F.3d 690, 700 (9th Cir.1994) ("As a general rule, one who voluntarily pleads guilty to a criminal charge may not subsequently seek federal habeas relief on the basis of pre-plea constitutional violations"). Such a petitioner may only contend that his guilty plea was not voluntary and intelligent (see e.g., Hill v. Lockhart, 474 U.S. 52, 56 (1985); Boykin v. Alabama, 395 U.S. 238, 242-43 (1969)) or challenge the assistance of counsel under the Sixth Amendment. See, e.g., McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970); Tollett, 411

U.S. at 267, 93 S.Ct. at 1608; Hudson, 760 F.2d at 1030.

In the present case, Petitioner's claim of actual innocence is a pre-plea matter which is barred by Tollet. Further, claims of actual innocence are not cognizable in federal habeas corpus except as a way to show a "fundamental miscarriage of justice" to overcome an otherwise valid procedural bar to a claim. See Herrera v. Collins, 506 U.S. 390, 404 (1993). Substantive actual innocence claims are not available in non-capital cases. Coley v. Gonzalez, 55 F.3d 1385, 1387 (9th Cir. 1995). This is the claim that Petitioner is attempting to make. Under the AEDPA, exhaustion can be waived by respondent. 28 U.S.C. Section 2254(b)(C). Because Respondent does not mention the fact that Petitioner has not presented this claim to the California Supreme Court, the court finds that Respondent has waived exhaustion as to this claim.

After conducting an independent review of the record, the court concludes, based on the above, that Petitioner has failed to carry his burden of demonstrating that the adjudication of this claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding." 28 U.S.C. § 2254(d). Accordingly, the court finds that this claim provides no basis for habeas corpus relief.

ARREST WARRANT

Petitioner contends that he was denied his Constitutional right to due process because his arrest warrant was not signed by a "neutral and detached magistrate," in violation of state law. As set out above, following a guilty plea, federal habeas corpus will not lie for pre-plea violations. Tollet, 411 U.S. 258. Further, Petitioner's claim is based on an alleged Fourth Amendment violation. Federal habeas corpus relief does not lie for Fourth Amendment violations. Stone v. Powell, 428 U.S. at 465. Because Respondent does not mention the fact

that Petitioner has not presented this claim to the California Supreme Court, the court finds that Respondent has waived exhaustion as to this claim.

After conducting an independent review of the record, the court concludes, based on the above, that Petitioner has failed to carry his burden of demonstrating that the adjudication of this claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding." 28 U.S.C. § 2254(d). Accordingly, the court finds that this claim provides no basis for habeas corpus relief.

PERJURED TESTIMONY

Petitioner claims that the prosecutor knowingly used perjured testimony to obtain Petitioner's conviction, and that this violated Petitioner's right to a fair trial under the Sixth Amendment. Again, this is a pre-plea matter which is barred from consideration on federal habeas corpus by Tollet. Further, the court finds that, as Respondent argues, this claim has no factual basis. The prosecution did not use any testimony to obtain Petitioner's conviction - Petitioner pleaded guilty. Because Respondent does not mention the fact that Petitioner has not presented this claim to the California Supreme Court, the court finds that Respondent has waived exhaustion as to this claim.

After conducting an independent review of the record, the court concludes, based on the above, that Petitioner has failed to carry his burden of demonstrating that the adjudication of this claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding." 28 U.S.C. § 2254(d). Accordingly, the court finds that this claim provides no basis for habeas corpus

relief.

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Petitioner contends that his trial counsel was ineffective for failing to adequately investigate and failing to be a true advocate for Petitioner. Petitioner previously raised this contention in petition for writ of habeas corpus filed in the California Supreme Court on March 2, 2001. The court denied that petition without explanation on June 27, 2001. No lower court provided a reasoned explanation for its decision on this issue.

The law governing ineffective assistance of counsel claims is clearly established for the purposes of the AEDPA deference standard set forth in 28 U.S.C. § 2254(d). Canales v. Roe, 151 F.3d 1226, 1229 (9th Cir. 1998.) In a petition for writ of habeas corpus alleging ineffective assistance of counsel, the court must consider two factors. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984); Lowry v. Lewis, 21 F.3d 344, 346 (9th Cir. 1994). First, the petitioner must show that counsel's performance was deficient, requiring a showing that counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. Strickland, 466 U.S. at 687. The petitioner must show that counsel's representation fell below an objective standard of reasonableness, and must identify counsel's alleged acts or omissions that were not the result of reasonable professional judgment considering the circumstances. Id. at 688; United States v. Quintero-Barraza, 78 F.3d 1344, 1348 (9th Cir. 1995). Judicial scrutiny of counsel's performance is highly deferential. A court indulges a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984); Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir.1994).

Second, the petitioner must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result ... would have been different," 466 U.S., at 694. Petitioner must show that counsel's errors were so egregious as to deprive defendant of a

fair trial, one whose result is reliable. Strickland, 466 U.S. at 688. The court must evaluate whether the entire trial was fundamentally unfair or unreliable because of counsel's ineffectiveness. Id.; Quintero-Barraza, 78 F.3d at 1345; United States v. Palomba, 31 F.3d 1356, 1461 (9th Cir. 1994).

A court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the petitioner as a result of the alleged deficiencies. Strickland, 466 U.S. 668, 697, 104 S.Ct. 2052, 2074 (1984). Since the petitioner must affirmatively prove prejudice, any deficiency that does not result in prejudice must necessarily fail. However, there are certain instances which are legally presumed to result in prejudice, e.g., where there has been an actual or constructive denial of the assistance of counsel or where the State has interfered with counsel's assistance. See Strickland, 466 U.S. at 692; United States v. Cronic, 466 U.S., at 659, and n. 25, 104 S.Ct., at 2046-2047, and n. 25 (1984).

Ineffective assistance of counsel claims are analyzed under the "unreasonable application" prong of Williams v. Taylor, 529 U.S. 362 (2000). Weighall v. Middle, 215 F.3d 1058, 1062 (2000).

In the present case, Petitioner alleges various deficiencies in trial counsel's representation of him which occurred before he entered his plea. Ineffectiveness claims as to pre-plea matters, however, are barred by Tollet. Petitioner does make one post-plea claim in which he argues that counsel was unprepared in handling his motion to withdraw his guilty plea. A copy of the transcript of the hearing at which that motion was made is attached to the petition. The court finds that trial counsel presented a cogent argument in support of the motion, emphasizing that the alleged victim had completely changed her story as to what had occurred. Moreover, the court finds that Petitioner has utterly failed to demonstrate that had trial counsel presented further arguments in support of the motion to withdraw petitioner's plea, the outcome would have been different. The court finds that, as

Respondent argues, the comments of the trial judge indicate that he was unconvinced that there was any factual basis for the withdrawal of the plea. Petition, Exhibit B, 32 - 36. Further, Petitioner has alerted the court to no such basis in either his petition or in his traverse. Petitioner merely speculates that further investigation by trial counsel would have uncovered facts contrary to what was presented in the presentence report. Petitioner's version of the facts was, however, argued to the court at the hearing on the motion.

After conducting an independent review of the record, the court concludes, based on the above, that Petitioner has failed to carry his burden of demonstrating that the adjudication of this claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d). Accordingly, the court finds that this claim provides no basis for habeas corpus relief.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Petitioner contends that he received ineffective assistance of appellate counsel because his appellate counsel filed a brief pursuant to People v. Wende, 25 Cal.3d 436 (1979). Petitioner raised this issue in his petition for writ of habeas corpus filed in the California Supreme Court on November 29, 2001, which was denied with citations to In re Clark; In re Swain, and In re Duvall. Respondent does not argue that Petitioner's claim of ineffective assistance of appellate counsel is procedurally barred.

Effective assistance of appellate counsel is guaranteed by the Due Process Clause of the Fourteenth Amendment. Evitts v. Lucey, 469 U.S. 387, 391-405 (1985). Claims of ineffective assistance of appellate counsel are reviewed according to Strickland 's two-pronged test. Miller v. Keeney, 882 F.2d 1428, 1433 (9th Cir.1989); United States v. Birtle, 792 F.2d 846, 847 (9th Cir.1986); See, also, Penson v. Ohio, 488 U.S. 75, 109 S.Ct. 346, 353-54 (1988) (holding that where a defendant has been actually or constructively denied the assistance of appellate counsel altogether, the Strickland standard does not apply

and prejudice is presumed; the implication is that Strickland does apply where counsel is present but ineffective).

To prevail, Petitioner must show two things. First, he must establish that appellate counsel's deficient performance fell below an objective standard of reasonableness under prevailing professional norms. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 2064 (1984). Second, Petitioner must establish that he suffered prejudice in that there was a reasonable probability that, but for counsel's unprofessional errors, she would have prevailed on appeal. Id. at 694. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. Id. The relevant inquiry is not what counsel could have done; rather, it is whether the choices made by counsel were reasonable. Babbitt v. Calderon, 151 F.3d 1170, 1173 (9th Cir.1998). The presumption of reasonableness is even stronger for appellate counsel because he has wider discretion than trial counsel in weeding out weaker issues; doing so is widely recognized as one of the hallmarks of effective appellate assistance. Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir.1989). Appealing every arguable issue would do disservice to the Petitioner because it would draw an appellate judge's attention away from stronger issues and reduce appellate counsel's credibility before the appellate court. Id. Appellate counsel has no constitutional duty to raise every nonfrivolous issue requested by petitioner. Id at 1434 n10 (*citing* Jones v. Barnes, 463 U.S. 745, 751-54, 103 S.Ct. 3308 (1983)).

In this case, the Court of Appeal agreed with appellate counsel that there were no arguable issues, stating:

> Our independent review of the present record failed to disclose any reasonably arguable issues. A reasonably arguable issue is one which (1) "must have a reasonable potential for success" and (2) is "such that, if resolved favorably to the appellant, the result with either be a reversal or a modification of the judgment." (*People v. Johnson*, 123 Cal.App.3d 106, 109 (1980).)

Unpublished Opinion in case number F032480, filed March 2, 2000. The issue which Petitioner contends should have been raised on appeal is the trial court's denial of his

Marsden motion. This court has examined the transcript of the Marsden hearing provided as Exhibit A to the petition. The trial court explained the basis of its decision in denying the motion to Petitioner, particularly about Petitioner's desire to present witnesses at the preliminary hearing. This court finds nothing in the transcript which raises a reasonably arguable issue for appeal. See People v. Johnson, 123 Cal.App.3d at 109. The court finds, therefore, that Petitioner has failed to carry his burden of demonstrating that the adjudication of this claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d). Accordingly, the court finds that this claim provides no basis for habeas corpus relief.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED as follows:

1) The petition for writ of habeas corpus is DENIED; and

2) The Clerk of the Court is directed to ENTER JUDGMENT for Respondent and to CLOSE this case.

IT IS SO ORDERED.

Dated: August 29, 2005 **/s/ William M. Wunderlich**
mmkd34 UNITED STATES MAGISTRATE JUDGE